Missouri created no protected right to investigatory procedures, applying this Courts rulings in *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454 (1972) and *Olim v. Wakinekona*, 461 U.S. 238 (1983). Pet. App. 14a, 19a-20a. Though the Eighth Circuit noted that Missouri statutes contained many mandatory procedures, the court found that the statutes did not mandate a particular result, leaving the actual outcome of the procedures to the discretion of the social worker. Pet. App. 18a. Under *Thomson* and *Olim*, if no substantive outcome is mandated, there is no protected right.

Additionally, the Eighth Circuit reviewed its own precedent and found this conclusion to be consistent with similar cases involving Minnesota child protection statutes (*Doe v. Hennepin County*, 858 F.2d 1325 (8th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987)). Pet. App. 16a. Moreover, the Eighth Circuit found its ruling in full harmony with other circuit courts of appeal that have analyzed child welfare statutes, all of which found that mandatory procedures do not create entitlements: *Sealed v. Sealed*, 332 F.2d 51 (2nd Cir. 2003); *Doe v. Dist. of Columbia*, 320 U.S. App. D.C. 198 (D.C. Cir. 1996); *Tony L. v. Childers*, 71 F.3d 1182 (6th Cir. 1995); *Doe v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990). Having found no violation of a constitutional right, the Eighth Circuit ruled in favor of Johnson and Rosa.

The court next considered and rejected Forrester's claim of violation of substantive due process rights. Under this Court's ruling in *DeShaney*, a state has no duty to protect its citizens from abuse by private actors, unless an individual is in the custody of the state, or the state acts affirmatively to create a danger for the individual. *DeShaney*, 489 U.S. at 197-201. Larry and Gary Bass were never in the custody of the state, and the Eighth Circuit correctly ruled that Johnson and Rosa had no duty to intervene and rescue the children from their mother. Pet. App. 20a.

With respect to Forrester's claim that Johnson and Rosa created a danger to Larry and Gary, the Eighth Circuit found

that there were no affirmative acts of endangerment by Johnson or Rosa, and that the children remained in the same circumstances after Johnson's visit as they were before Johnson's visit. Pet. App. 21a. In addition to the plain and direct application of *DeShaney*, the Eighth Circuit also considered its prior cases and found consistency among the opinions: *See Burton v. Richmond*, 370 F.2d 723 (8th Cir. 2004); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000). Additionally, the Eighth Circuit concluded that the acts alleged to have been committed by Johnson and Rosa were not conscience-shocking under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

Forrester cites only *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002) as an opinion in conflict with the Eighth Circuit. *Vinyard* was an excessive force case against a police officer who arrested the plaintiff. The court noted that it must first be shown that the defendant was acting within the scope of his discretionary authority. *Id.* at 1346. The court swiftly concluded that the officer was acting within the scope of his authority because he was making an arrest. In other words, there was no issue as to whether he was acting within his authority, and the court's entire discussion of this point was limited to the one sentence. *Id.* Neither is there any issue as to whether Johnson and Rosa were acting within the scope of their discretionary authority when concluding that the Bass family did not require state intervention after Johnson's family assessment.

In spite of the fact that the Eighth Circuit explicitly found Johnson and Rosa to be acting within the discretionary authority granted by Missouri statutes (Pet. App. 18a), Forrester complains that the court failed to recite this obvious fact as part of the elements of a qualified immunity analysis. This, according to Forrester, puts the Eighth Circuit's opinion in conflict with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which stated that qualified immunity applies to acts done with in the scope of an official's discretionary authority.

But even Forrester recognizes that such recitations do not appear when the matter is not at issue. Forrester himself cites this Court's decisions in *Saucier* and *Hope v. Pelzer*, 536 U.S. 730 (2002) as examples of cases that do not specifically discuss the discretionary-ministerial distinction as part of the qualified immunity analysis precisely because the matter is not at issue.

More instructive is what Forrester fails to cite. This Court's opinion in *Davis v. Scherer*, 468 U.S. 183 (1984), considered a claim very similar to the case at bar. In *Davis*, a discharged highway patrol officer claimed that the violation of a clear statute or regulation (in that case, mandatory regulations in effecting his discharge) should deprive an official of qualified immunity from damages for a claim under federal constitutional provisions. *Id.* at 193. This Court specifically declined to adopt this rule. *Id.* at 194. This Court reasoned that the breach of a duty created by a regulation would only forfeit immunity if the breach of the regulation itself gives rise to the cause of action regardless of whether it is characterized as discretionary or ministerial. *Id.* at 196, n. 14.

The Eighth Circuit's opinion is carefully reasoned and thorough. Forrester demonstrates no conflict with prior U.S. Supreme Court cases, nor does Forrester show even the slightest inconsistency between the Eighth Circuit's opinion and any other circuit court. Accordingly, review should be denied.

II. The Eighth Circuit's ruling that Missouri statutes do not create protected entitlements is in full harmony with U.S. Supreme Court precedent as well as decisions from the Second, D.C., Sixth and Seventh and Eighth Circuits.

There is no federal constitutional right that certain state mandated procedures be followed, as such a rule would make "procedure" an end in and of itself. *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983). Forrester's claim that there is a federal right to have Johnson and Rosa follow state rules for conducting investigations is just such a circumstance, and this claim was properly rejected by the Eighth Circuit. It is true that a constitutionally protectible interest may be created in a procedure where a particular outcome is mandated upon a finding that certain criteria have been met. *Thompson*, 490 U.S. at 462. But such an interest may arise only when there are specific directives to the decision maker that if certain substantive predicates are present a particular result must follow. *Thompson*, 490 U.S. 463.

Forrester declares that the "prevention of abuse" and "safeguarding of children" are the specific outcomes mandated by Missouri law, and the Eighth Circuit's ruling that no outcomes are mandated conflicts with this Court's opinion in *Thompson*. Pet. 10. But, obviously, the "prevention of abuse" and "safeguarding of children" are not outcomes at all. Accordingly, the Eighth Circuit found that Missouri statutory language, "simply mandates particular preliminary actions be undertaken and authorized the provision of social services, thereby leaving the particular substantive outcome in each case to the sound discretion of trained social workers and law enforcement officers." App. 18a. Thus, the Eighth Circuit's opinion is in full harmony with *Thompson*.

Forrester's final attempt to show a conflict among the lower courts is a citation to a single, unappealed 1996 district court opinion, a passing reference to the cases cited "therein,"

and no discussion whatsoever. It is true that the district court in *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) concluded that certain provisions of New York's child protection procedures created property interests in the children seeking protection, and that *Marisol* is in conflict with the Eighth Circuit's decision before this Court. However, *Marisol* is also in conflict with *Thompson*. *Marisol* quite literally declared that mandatory language, alone, appearing in the child protection statutes at issue created property interests in spite of the fact that specific outcomes are not required. ("That Title 6 requires ... appropriate measures rather than specific steps ... does not alter the mandatory nature of the scheme.") *Marisol*, 929 F.Supp. at 680). This is plainly in conflict with *Thompson*.

The cases cited in *Marisol* do not demonstrate a conflict either. In two of these, the courts of appeal have found protectible interests in procedures relating to child protection–but in cases involving children who are in the custody of the state and placed in state-licensed foster care homes. For example, the Sixth Circuit found that such children have a substantive due process right to be free from the infliction of unnecessary harm, but also that the state statutes that govern the protection of children in state custody and in state institutions specifically created entitlements protected under the U.S. Constitution. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476-77 (6th Cir. 1990). In contrast, the Bass children were not in state custody, and in fact were living with their mother. Likewise, *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 798-800 (11th Cir. 1987), also cited in *Marisol*, concerned only children in the custody of the state.

The remaining appeals court cases cited in *Marisol* found no protectible interests in child protection procedures:

In *Tony L. ex rel. Simpson v. Childers*, 71 F.3d 1182 (6th Cir. 1995), the children were in the custody of their mother, and in the applicable state statutes, no particular substantive outcome was mandated. "The requirement that an investigation be initiated only gives plaintiffs an expectation of receiving a

certain process." *Id.* at 1186.

Children in the custody of their mother brought suit against the state for failing to investigate allegations of abuse in *Doe ex rel. Nelson v. Milwaukee County*, 903 F.2d 499, 502-05 (7th Cir. 1990). The court held that the Wisconsin child abuse reporting statute does not vest plaintiffs with constitutionally-protected property interest. Citing *Cain v. Larson*, 879 F.2d 1424, 1426 (7th Cir. 1989), the court said that "It is by now well-established that in order to demonstrate a property interest worthy of protection under the fourteenth amendment's due process clause, a party may not simply rely upon the procedural guarantees of state law or local ordinance.");

Forrester fails to show any conflict among the circuit courts of appeal or that this Court's decision in *Thompson* is somehow inadequate.

III. Review is not warranted on the issue of appropriate consideration of causation on a qualified immunity appeal because the Eighth Circuit did not rule on the issue of causation.

The Eighth Circuit rejected Forrester's substantive due process claim that Johnson and Rosa somehow increased the danger to Larry and Gary in the manner in which the investigation of abuse was conducted. In rejecting this claim, the Eighth Circuit found that neither Johnson nor Rosa committed any acts of endangerment. Pet. App. 21a. Accordingly, with the children in the custody of their mother, and neither Johnson nor Rosa taking action to change the circumstances of the children, the Eighth Circuit ruled that Forrester's claim was barred by this Court's decision in *DeShaney* (Pet. App. 20a), and the Eighth Circuit cases of *S.S.*, *Ferguson*, and *Burton*. Forrester argues that in arriving at this conclusion, the Eighth Circuit made a ruling on causation, one that would go to the merits of the action and therefore be inappropriate in a qualified immunity analysis. But the Eighth Circuit made no ruling on the merits of the case.

It is true that the Eighth Circuit stated that the record did not substantiate the requisite causal connection (App. 21a), but nowhere did the court make any ruling based on that conclusion. The court's conclusion was that there were no acts of endangerment to consider. App. 21a. The children were in the custody of their mother when the state assessed the family, and the children remained in the custody of their mother when the state left. Having already found that the children had no right to be rescued by the state, and that there was no protectible interest in having certain investigatory procedures followed by Johnson or Rosa, the Eighth Circuit merely recognized that the circumstances of the children had not changed. "The filing of the Bass family assessment report and other acts by Johnson and Rosa were not affirmative acts of endangerment, which 'created greater risks [to the children].'" Pet. App. 21a (citing

S.S. v. McMullen, 225 F.3d 960, 963 (8th Cir. 2000). App. 21a.

Forrester argues that the Eighth Circuit's opinion conflicts with this Court's ruling in *Johnson v. Jones*, 515 U.S. 304 (1995). In *Johnson*, the qualified immunity issue centered on a question of the sufficiency of the pretrial record. This Court held that a defendant asserting qualified immunity may not appeal its denial if the order appealed from determines whether there is a genuine issue of fact for trial. *Id.* at 319-320. Here, the Eighth Circuit did not overrule a trial court determination that certain acts of endangerment could have caused damage to the Bass children, leaving the resolution of that issue for a jury. The Eighth Circuit merely observed that there were no acts of endangerment by the state at all. There was no ruling on causation or any other aspect of the merits. Thus, the decision of the Eighth Circuit in no way conflicts with prior decisions of this Court.

IV. Resolution of the issues in this case involve the application of long-standing and well-established law and was correctly ruled by the Eighth Circuit. This case does not present new or novel issues of law.

At least since this Court's decision in *Deshaney* in 1989, the state has no duty to rescue its citizens from violence committed by prior actors. *DeShaney*, 489 U.S. at 197. It does not matter that the state somehow becomes aware of risks to particular individuals. If the state did not create those risks, or hold a person in custody where such risks arose, the state does not have a duty to protect a person from those risks. *Id.*, at 197-201. Forrester points to no change in the law, nor does Forrester argue a need to change such laws. Because Johnson and Rosa merely investigated a report of abuse and neglect with respect to children not in state custody, they had no duty to intervene and the Eighth Circuit dismissed this claim on that basis. The children were in the same circumstances and subject to the same risks after state involvement as before state involvement.

Forrester further argues that Johnson and Rosa somehow cut off private avenues of rescue by filing a report indicating that Gary and Larry were safe when in fact they were not. Forrester cites *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), for the proposition that a citizen who is in peril has a Fourteenth Amendment right not to have private avenues of help cut off by a state actor. Petition 13. *Ross* involved a deputy sheriff who actively refused to permit private citizens to help a drowning victim. But Forrester points to no private sources of help, nor to any action by Johnson or Rosa that would have or could have cut off any such assistance. At most, Forrester offers the circular argument that Johnson and Rosa decided that the Bass children did not need further intervention, and thereby prevented themselves from acting further – or, at least, prevented the state social service agency for which the

worked from taking further action. Forrester's argument begs the question.

The legal issues decided by the Eighth Circuit were based on long-established law and are in harmony with other circuit courts of appeal as well as this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Counsel of Record
JOEL E. ANDERSON
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-9456

Counsel for Respondents

July 20, 2005